Marcel Jude Joseph v The Minister of Education, Ministry of Education, Malaysia

HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICAL REVIEW NO BKI-25–58/11 OF 2011
ABDUL RAHMAN SEBLI J
17 FEBRUARY 2012

Administrative Law — Remedies — Judicial review — Application for leave to apply for review — Decision of respondent to abolish policy of teaching science and mathematics in English in Sabah — Whether decision was policy decision — Whether reviewable

Civil Procedure — Judicial review — Application for leave to apply for judicial review — Decision of respondent to abolish policy of teaching Science and Mathematics in English in Sabah — Preliminary objection — Whether order by SAR to amend applicant's statement of facts obtained irregularly — Whether case fit for further consideration to warrant grant of leave — Whether applicant had locus standi to institute present application — Whether application time-barred — Rules of the High Court 1980 O 53

The applicant, a lawyer in active practice in the High Court of Sabah and Sarawak, filed the present application for leave to apply for judicial review of the decision of the respondent to abolish the policy of teaching science and mathematics in the English language in the state of Sabah ('the PPSMI'). The applicant, who was representing himself in the present application, claimed that he was involved in the field of education by virtue of being the deputy president of the Association of Ex-students of La Salle andSacred Heart ('the association'). The appellant submitted, inter alia, that the respondent's decision to abolish the PPSMI in the state of Sabah was ultra vires and unlawful. Thereafter the applicant filed an ex parte application before the senior assistant registrar ('the SAR') to include a second applicant, a teacher, and a second respondent, the Ministry of Education as parties to the application; and to amend his statement of facts to insert the reliefs he sought by way of this application. The SAR granted the applicant an order in terms of his application. At the hearing of this leave application the respondent objected to the inclusion of the second applicant and the Ministry as parties to the application as well as to the amendment made to the applicant's statement of facts. The respondent submitted that the applicant could not add new parties to the application under the guise of an amendment to the statement of facts.

The respondent further argued that the SAR had no jurisdiction to hear the ex parte application, which came under the purview of the High Court judge. A

Held, dismissing the application with costs:

(1) The use of the words 'judge' rather than 'the High Court' in O 53 r 7(1) of the Rules of the High Court 1980 ('RHC') signified that the power to order the amendments in the present case was vested in a High Court judge and not a SAR. Therefore, the order allowing the addition of two new parties to the action and granting the applicant leave to amend his statement of facts was obtained irregularly. The SAR's order in the present case was thus an irregular order which was accordingly set aside. Thus the only parties to the present application were the original parties, ie the applicant and the respondent (see paras 6–7). B C

(2) After having perused the applicant's affidavit in support and the arguments of both sides it was found that there was no case fit for further consideration to warrant the grant of leave. This court found that the applicant had failed to bring his case within the purview of s 44(1)(a) of the Specific Relief Act 1950, in that he failed to show how his personal right would be injured if the orders he was seeking were not granted by the court (see para 10). D E

(3) Further it was a requirement under O 53 r 2(4) of the RHC that only persons who were adversely affected by the decision of the public authority were entitled to make an application for leave to apply for judicial review. In the present case the applicant failed to show in what manner he was adversely affected by the decision of the respondent to abolish the PPSMI. The applicant's claim that he was the deputy president of the association was hardly sufficient to establish adverse effect, particularly since he failed to support this claim with any documentary evidence. The applicant therefore lacked locus standi to institute the present application (see paras 10b–d). F G

(4) The applicant failed to make the application within the time prescribed by O 53 r 3(6) of the RHC, ie within 40 days from the date Cabinet decided to abolish the PPSMI. The application was therefore time barred and as such this court had no jurisdiction to grant leave (see para 10e). H

(5) The decision by the respondent to abolish the PPSMI was a non-justiciable decision and was not capable of judicial determination. The decision to abolish the PPSMI was clearly a policy decision undertaken by the government based on the exercise of a function by the respondent as Minister of Education and as such the applicant had no legal right to compel the respondent to continue with the implementation of the PPSMI in the state of Sabah. Thus, the application for leave was frivolous and lacked substance (see para 10f). I

[Bahasa Malaysia summary

Pemohon, seorang peguam yang aktif beramal di Mahkamah Tinggi Sabah dan Sarawak, memfailkan permohonan ini untuk kebenaran memohon semakan kehakiman terhadap keputusan responden untuk memansuhkan polisi pengajaran Sains dan Matematik dalam Bahasa Inggeris di Negeri Sabah ('PPSMI'). Pemohon, yang mewakili dirinya di dalam permohonan ini, mendakwa bahawa dia terlibat dalam bidang pendidikan berikutan penglibatannya sebagai presiden Persatuan Bekas Pelajar La Salle dan Sacret Heart ('persatuan tersebut'). Perayu menghujah bahawa, antara lain, keputusan responden untuk memansuhkan PPSMI di negeri Sabah adalah ultra vires dan tidak sah. Kemudian pemohon memfailkan permohonan ex parte di hadapan penolong kanan pendaftar ('PKP') untuk memasukkan pemohon kedua, seorang guru, dan responden kedua, Kementerian Pendidikan sebagai pihak-pihak kepada permohonan; dan untuk meminda pernyataan fakta untuk memasukkan relief-relief yang dipohonnya melalui permohonan ini. PKP membenarkan perintah seperti yang dipohon dalam permohonannya. Semasa perbicaraan permohonan kebenaran ini responden membantah kemasukan pemohon kedua dan Kementerian sebagai pihak-pihak kepada permohonan dan juga kepada pindaan yang dibuat di dalam pernyataan fakta pemohon. Responden menghujah bahawa pemohon tidak boleh menambah pihak baru kepada permohonan sebagai pindaan kepada pernyataan fakta. Responden selanjutnya menghujah bahawa PKP tidak mempunyai bidang kuasa untuk mendengar permohonan ex parte, yang terangkum di bawah bidang kuasa hakim Mahkamah Tinggi.

Diputuskan, menolak permohonan dengan kos:

(1) Penggunaan perkataan 'judge' dan bukan 'the High Court' dalam A 53 k 7(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') menunjukkan bahawa kuasa untuk memerintahkan pindaan di dalam kes ini terletakhak dalam hakim Mahkamah Tinggi dan bukan PKP. Dengan itu, perintah membenarkan penambahan dua pihak baru kepada tindakan dan memberikan pemohon kebenaran untuk meminda pernyataan fakta adalah diperoleh secara tidak teratur. Perintah PKP di dalam kes ini adalah perintah yang tidak teratur yang dengan itu diketepikan. Oleh demikian pihak-pihak di dalam permohonan ini hanyalah pihak-pihak yang asal iaitu, pemohon dan responden (lihat perenggan 6–7).

(2) Selepas meneliti afidavit sokongan pemohon dan hujahan kedua-dua pihak didapati bahawa tidak ada kes yang sesuai untuk pertimbangan lanjut yang mewajarkan pemberian kebenaran. Mahkamah ini mendapati bahawa pemohon telah gagal membawa kesnya dalam rangkuman s 44(1)(a) Akta Relief Spesifik 1950, di mana dia gagal menunjukkan bagaimana hak peribadinya akan terancam jika perintah yang dipohonnya tidak diberikan oleh mahkamah (lihat perenggan 10).

(3) Selanjutnya, adalah keperluan di bawah A 53 k 2(4) KMT bahawa hanya pihak yang terjejas oleh keputusan pihak berkuasa awam berhak membuat permohonan kebenaran untuk memohon semakan kehakiman. Di dalam kes ini pemohon gagal menunjukkan dalam cara apa dia terjejas dengan keputusan responden untuk memansuhkan PPSMI. Tuntutan pemohon bahawa dia adalah timbalan presiden persatuan tersebut adalah tidak mencukupi untuk membuktikan kejejasan, khususnya oleh sebab dia gagal menyokong tuntutan ini dengan apa-apa keterangan dokumentasi. Pemohon dengan itu tiada locus standi untuk memulakan permohonan ini (lihat perenggan 10b–d).

(4) Pemohon gagal membuat permohonan dalam tempoh masa yang ditentukan oleh A 53 k 3(6) KMT, iaitu dalam masa 40 hari daripada tarikh Kabinet memutuskan untuk memansuhkan PPSMI. Permohonan tersebut oleh itu adalah dihalang oleh masa dan dengan itu mahkamah ini tidak mempunyai bidang kuasa untuk memberikan kebenaran (lihat perenggan 10e).

(5) Keputusan oleh responden untuk memansuhkan PPSMI adalah keputusan yang bukan kehakiman dan tidak boleh diputuskan secara kehakiman. Keputusan untuk memansuhkan PPSMI adalah jelas keputusan polisi yang diambil oleh kerajaan berdasarkan kepada pelaksanaan fungsi oleh responden sebagai Menteri Pendidikan dan dengan itu pemohon tidak ada hak dari segi undang-undang untuk memaksa responden untuk meneruskan dengan pelaksanaan PPSMI di negeri Sabah. Oleh itu, permohonan untuk kebenaran adalah remeh dan tidak berisi (lihat perenggan 10f).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 781–787.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37; [1982] 1 LNS 21, FC (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kiat Siang [1988] 2 MLJ 12; [1988] 1 CLJ (Rep) 63, SC (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180 (refd)

Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54; [1983] CLJ (Rep) 266, FC (refd)

Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] 2 CLJ (Rep) 329, SC (refd)
Thien Tham Sang v United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 32 r 9, O 53 rr 2(4), 3(2), (6), 7(1)
Specific Relief Act 1950 s 44(1)(a)

Applicant in person.
Shamsul Bolhassan (Nuraini bt Azmil, Federal Counsel with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli J:

[1] This application for leave to move for judicial review is to seek the following reliefs:

(a) an order of certiorari in so far as the State of Sabah is concerned to quash the decision of the respondent to abolish the *pengajaran dan pembelajaran Sains dan Matematik dalam bahasa Inggeris* ('PPSMI');

(b) an order of mandamus to the respondent in so far as the State of Sabah is concerned to continue implementation of PPSMI in the State of Sabah;

(c) an order of prohibition to the respondent from abolishing the PPSMI in the State of Sabah;

(d) a declaration in so far as the State of Sabah is concerned that the decision by the respondent to abolish the PPSMI in the State of Sabah is ultra vires and unlawful; and

(e) any other relief deemed fit by the court.

[2] In pith and substance the intended application is to compel the Minister of Education to reinstate the policy of teaching Science and Mathematics in the English language in the State of Sabah which the Federal Government had decided to discontinue in 2009. With the decision, the medium of instruction for these two subjects in all schools throughout Malaysia reverts back to the Malay language. Although not stated in the application, it is common knowledge that the applicant is a lawyer actively practising in the High Court of Sabah and Sarawak at Kota Kinabalu. He is representing himself in the present application.

[3] The application is supported by the applicant's statement of facts made

pursuant to O 53 r 3(2) of the Rules of the High Court 1980 ('the Rules') and his affidavit in support affirmed on 11 November 2011. On 6 January 2012 the applicant applied for and obtained an order from the senior assistant registrar to amend the application for leave in the following terms:

(a) to include a second applicant, one Evelyn bt Charlie aka Madam Eve ('Evelyn') who is a teacher at SK Stella Maris, Tanjung Aru, Kota Kinabalu and a second respondent, the Ministry of Education ('the Ministry') as parties to the application;

(b) to file the statement of facts and the affidavit in support of the second applicant; and

(c) to amend the applicant's own statement of facts by inserting the reliefs sought which he omitted to do earlier.

[4] The application was made ex-parte to the senior assistant registrar, meaning to say it was made in the absence of the respondent or his counsel. According to learned senior federal counsel he only came to know of the amendments the day before the hearing of the present application. Thus, at the outset of the hearing for leave on 11 January 2012 learned senior federal counsel objected to the inclusion of Evelyn and the Ministry as parties to the application as well as to the amendment made to the applicant's statement of facts. It is significant to note that Evelyn did not apply to be added as a party. She was added as a party by the applicant through his application to amend his statement of facts.

[5] In my view the point was validly taken by learned senior federal counsel that while an amendment may be made to the statement of facts made pursuant to O 53 r 3(2) of the Rules the applicant cannot, under the guise of amendment, add new parties to the application. More importantly, the senior assistant registrar had no jurisdiction to hear the application for amendment as such application comes under the purview of the High Court judge: see O 53 r 7(1) of the Rules which provides as follows:

> The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the applications and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party.

[6] I cannot accede to the applicant's argument that O 32 r 9 of the Rules empowers the senior assistant registrar to order the amendments. The use of the words 'the judge' rather than 'the High Court' in O 53 r 7(1) signifies that the power is vested in a High Court judge and not a senior assistant registrar. Therefore the order allowing the inclusion of Evelyn and the Ministry as parties

to the action was obtained irregularly. So is the order granting leave to the applicant to amend his statement of facts.

[7] An order that has been obtained irregularly is not a valid order and is liable to be set aside without the necessity of going through the appeal process. A null and void order is as good as no order at all and is subject to a collateral attack: see *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37; [1982] 1 LNS 21, FC.

[8] In the circumstances the order to add Evelyn and the Ministry as parties to the application and the order allowing amendment to the applicant's statement of facts are set aside. Thus the only parties to the application are the original parties, namely Marcel Jude Joseph and the Minister of Education, Ministry of Education, Malaysia.

[9] In an application for judicial review the guiding principles ought to be that the applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: see *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 (FC). In *Tuan Hj Sarip & Anor v Patco Malaysia Berhad* [1995] 2 MLJ 442; [1995] 3 CLJ 627 it was held by the Federal Court that if the judge is satisfied that there is no arguable case he should dismiss the application for leave.

[10] I have gone through the applicant's affidavit in support and the arguments of both sides carefully and I am satisfied that there is no case fit for further consideration to warrant the grant of leave, for the following reasons:

(a) the applicant fails to bring his case within the purview of s 44(1)(a) of the Specific Relief Act 1950 in that he fails to show how his personal right would be injured if the orders he is seeking for are not granted by the court. There is nothing in his affidavit affirming to this fact. In this connection it is apt to refer to the judgment of Hashim Yeop A Sani J (as he then was) in *Thien Tham Sang v United States Army Medical Research Unit* [1983] 1 MLJ 97 where His Lordship said at p 99:

> Under proviso (a) of s 44(1), the applicant had to show his personal right would be injured if the order is not made by the court. Nowhere in the affidavit of the applicant here was it stated that he had such personal right or that the personal right would be injured if the order was not given.

(b) Further, it is a requirement under O 53 r 2(4) of the Rules that only persons who are adversely affected by the decision of the public authority are entitled to make the application. The order provides as follows:

> Any person who is *adversely affected by the decision* of any public authority shall be entitled to make the application. (Emphasis added.)

The rule is therefore clear. Anyone who wants to apply for judicial review must first show that he is adversely affected by the decision of the public authority. In the present case the applicant fails to show in what manner he is adversely affected by the decision of the respondent to abolish the PPSMI. He merely states that he is involved in the field of education by virtue of being the Deputy President of the Association of Ex-Students of La-Salle and Sacred Heart which has among its objectives the provision of material as well as organisational support for La Salle and Sacred Heart School and the undertaking of civic action. This is hardly sufficient to establish adverse effect. He therefore lacks the locus standi to institute the present application.

The issue of locus standi in an application for mandamus was considered by the Supreme Court in *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] 2 CLJ (Rep) 329 where Lee Hun Hoe CJ (Borneo) said at p 346 (MLJ); p 334 (CLJ):

> Then there is the important question of the appellant's standing. He must have a specific legal right to ask the court to exercise its discretion to issue the order of mandamus. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to mandamus.

In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180 it was held by Sharma J that the applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The learned Judge went on to hold that the order of mandamus cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

(c) The applicant fails to state the reliefs that he is seeking for in his statement of facts. This is a serious breach of O 53 r 3(2) of the Rules which stipulates as follows:

> An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the reliefs sought and the grounds on which it is sought, and by affidavit verifying the facts relied on.

(d) The applicant claims to be the deputy president of the Association of Ex-Students of La Salle and Sacred Heart but fails to support his claim with documentary evidence. The articles and memorandum of association of the ex-students of La-Salle and Sacred Heart were not

produced, nor the minutes of the association's meetings. The inclusion of these documents is important to establish the applicant's standing in instituting the present action.

(e) The applicant failed to make the application within the time prescribed by O 53 r 3(6) of the Rules, ie within 40 days from the date the Cabinet decided to abolish the PPSMI. For ease of reference O 53 r 3(6) is reproduced below:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

The Cabinet decision was made on 8 July 2009 and the present application was only made on 11 November 2011, a delay of two years three months and two days. No application for abridgment of time was made by the applicant and neither has any valid reason been offered to explain the delay. The application is therefore time barred and as such the court has no jurisdiction to grant leave: see *Mersing Omnibus Co Sdn Bhd v The Minister of Labour & Manpower & Anor* [1983] 2 MLJ 54; [1983] CLJ (Rep) 266 (FC); *Ahmad Jefri bin Mohd jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 (FC); *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123 (CA).

(f) The decision by the respondent to abolish the PPSMI is a non-justiciable decision and is not capable of judicial determination. The litigation process and the expertise of the court are not suited for resolving the question in hand: see *De Smith's Judicial Review* (6th Ed). Its resolution is beyond the institutional competence of the court and would involve the court stepping outside its appropriate constitutional role: see *The Concept of 'Justiciability' in Administrative Law in Groves & Lee, Australian Administrative Law* (2007).

(g) It is not for the court to interfere with the decision of the government because the wisdom and policy decision of the government belongs to the government. The court cannot tell the public authority how to exercise its power: see *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kiat Siang* [1988] 2 MLJ 12; [1988] 1 CLJ (Rep) 63. The decision to abolish the PPSMI was clearly a policy decision undertaken by the Government based on the exercise of function by the respondent as Minister of Education and as such the applicant has no legal right to compel the respondent to continue with the implementation of the PPSMI in the State of Sabah.

[11] In short the application for leave is frivolous and lacks substance. It does not justify further argument on a substantive motion. In the circumstances the application is dismissed with costs.

Application dismissed with costs.

Reported by Kohila Nesan